

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>MARTIN S. AND AUDREY P. SCHWARTZ</b>	:	ORDER
	:	DTA NO. 819375
for Redetermination of a Deficiency or for Refund of New	:	
York State and New York City Personal Income Tax under	:	
Article 22 of the Tax Law and the New York City	:	
Administrative Code for the Year 1993.	:	

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Petitioners, Martin S. and Audrey P. Schwartz, 3265 North Ocean Boulevard, Gulf Stream, Florida 33483, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 1993.

The Division of Taxation, by its representative Barbara G. Billet, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated June 11, 2003, seeking summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(i) and 3000.9(b) of the Tax Appeals Tribunal's Rules of Practice and Procedure. Pursuant to section 3000.5(b), petitioners had 30 days to file a response to the motion. Petitioners did not file a response. Accordingly, the 90-day period for the issuance of this determination under section 3000.5(d) of the Rules began on July 11, 2003. Based upon the motion papers, the affidavits submitted therewith and all pleadings and documents submitted, Arthur S. Bray, Administrative Law Judge, renders the following order.

***ISSUE***

Whether petitioners filed a timely petition with the Division of Tax Appeals.

***FINDINGS OF FACT***

1. The Division of Taxation (“Division”) issued Notice of Determination, number L016958205, dated September 24, 1999, asserting a deficiency of personal income tax for the year 1993.
2. Petitioners filed a Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services (“BCMS”). The request was signed by a representative for petitioners and dated December 8, 1999. By a Conciliation Order dated December 15, 2000, BCMS reduced the amount of tax assessed to \$14,083.35. The reduction was based upon a reclassification of treasury bill interest and a cancellation of penalties. However, the conciliation conferee concluded that petitioners were liable for tax as residents of New York City for a certain period of time and that petitioners were statutory residents of New York State for the taxable year.
3. On or about April 16, 2002, petitioners paid in full the reduced amount of tax asserted to be due along with interest. On or about July 5, 2002, petitioners filed a Claim for Credit or Refund of Personal Income Tax.
4. In a letter dated August 16, 2002, the Division of Taxation (“Division”) advised petitioners that their claim for refund was denied because BCMS mailed a conciliation order dated December 15, 2000. The Division stated that any further review would have to be made through the Division of Tax Appeals.
5. Petitioners filed a petition with the Division of Tax Appeals dated September 25, 2002. The petition was accompanied by a cover letter dated February 19, 2003. The in-date stamps of

the Division of Tax Appeals show that the petition was received on February 24, 2003. In essence, the petition alleged that there was a failure to send petitioners and their representative certain required documents and requested a refund of \$33,529.68.

### ***SUMMARY OF THE DIVISION'S POSITION***

6. The Division argues, among other things, that the Division of Tax Appeals has no authority to review the denial of the refund because the petition was not filed within 90 days of the refund denial. The Division also argues that the Division of Tax Appeals has no authority to review the Conciliation Order because the petition was filed more than 90 days after the Conciliation Order was issued.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 689(c) provides, in part:

Petition for refund.- A taxpayer may file a petition with the [Division of Tax Appeals] for the amounts asserted in a claim for refund if –

(1) the taxpayer has filed a timely claim for refund with the tax commission,

(2) the taxpayer has not previously filed with the [Division of Tax Appeals] a timely petition under subsection (b) for the same taxable year unless the petition under this subsection relates to a separate claim for credit or refund properly filed under subsection (f) of section six hundred eighty-seven, and

(3) either (A) six months have expired since the claim was filed, or (B) the [Commissioner] has mailed to the taxpayer, by registered or certified mail, a notice of disallowance of such claim in whole or in part.

*No petition under this subsection shall be filed more than two years after the date of mailing of a notice of disallowance, unless prior to the written expiration of such two year period it has been extended by written agreement. . . . (Emphasis added.)*

B. Here, the Division has not argued that petitioners filed an untimely claim for a refund.

In addition, the Division has not asserted that petitioners previously filed a petition for the year

1993. Finally, the motion papers establish that the Division mailed petitioners a notice of disallowance of the claim. Therefore, accepting the dates set forth by the Division in its moving affidavit as correct, petitioners had two years, or until August 16, 2004, to file a petition, and it is clear that by virtue of Tax Law § 689(c) the petition to the Division of Tax Appeals was timely.

C. The Division of Taxation's motion for summary determination is denied and the matter will be scheduled for a hearing in due course.

DATED: Troy, New York  
August 21, 2003

/s/ Arthur S. Bray  
ADMINISTRATIVE LAW JUDGE